

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 TONY L. CUNNINGHAM,
10 Petitioner,
11 vs.
12 JO GENTRY, et al.,
13 Respondents.
14

Case No. 2:17-cv-01094-JCM-VCF
ORDER

15 Petitioner has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
16 Petitioner did not pay the filing fee, nor did he file an application to proceed in forma pauperis. The
17 court will not require petitioner to correct that problem. Instead, the court will dismiss the action
18 because it already has ruled upon the merits of petitioner's claim.

19 Petitioner challenges three judgments of conviction of the Second Judicial District Court of
20 the State of Nevada. He challenged the same judgments of conviction in Cunningham v. Williams,
21 2:16-cv-00388-APG-CWH (Cunningham I). In Cunningham I, petitioner's only ground for relief
22 was counsel provided ineffective assistance because counsel failed to challenge the validity of the
23 Nevada Revised Statutes under the doctrine of separation of powers. The court ruled that the
24 ground was without merit, and the court denied the petition. Petitioner did not appeal, and the
25 court's judgment has become final.

26 The body of the current petition in this action contains only a note that this is a protective
27 petition filed to comply with the one-year time limit of 28 U.S.C. § 2244(d). Attached to the
28 petition is an order of the state district court that denied his post-conviction habeas corpus petition.

1 The state district court noted that petitioner presented only one claim, which is exactly the same as
2 the claim that this court rejected in Cunningham I. The state district court ruled that the claim was
3 without merit. The court assumes that petitioner is trying to present that claim, and no other claim,
4 in the current petition. However, the court must dismiss the petition because petitioner already has
5 presented the same claim in Cunningham I, which the court denied because it was without merit.
6 See 28 U.S.C. § 2244(b)(1).¹

7 Reasonable jurists would not find the court's conclusion to be debatable or wrong, and the
8 court will not issue a certificate of appealability.

9 IT IS THEREFORE ORDERED that the clerk of the court file the petition for a writ of
10 habeas corpus.

11 IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice. The clerk of
12 the court shall enter judgment accordingly and close this action.

13 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

14 DATED: May 5, 2017.

15
16 
17 JAMES C. MAHAN
18 United States District Judge
19
20
21
22
23
24
25
26

27 ¹Even if petitioner wanted to present other claims in the current action, the court still would
28 dismiss this action because it denied Cunningham I on the merits, and petitioner has not obtained
authorisation from the court of appeals to file a second or successive petition. See 28 U.S.C.
§ 2244(b)(2), (3).